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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No. 889

HENRY HAROLD HOGUE,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY,
Respondent.

BRIEF ON BEHALF OF HENRY HAROLD HOGUE

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This Court granted Certiorari to review the Judgment of the Court of Appeals of the State of Georgia entered in case No. 42869, *Southern Railway Company v. Henry Harold Hogue*. This Opinion has not been reported yet. The jurisdiction of this Court is by the granting of the petition for Certiorari to review the Court of Appeal of Georgia's construction of the Federal Employer's Liability Act, contained in Title 45 U. S. C. A., Section 51, and particularly Section 55. The Judgment of the Court of Appeals of Georgia was dated and entered June 28, 1967. The Petition for Rehearing was denied June 14, 1967. Petition for Certiorari to the Supreme Court of Georgia was denied on September 7, 1967. A stay of the issuance of the Mandate of the Court of Appeals was granted by the Court of Appeals in order for petitioner to apply for Certiorari to this Court. This Court granted Certiorari on January 22, 1968.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involved provisions of the Fourteenth Amendment of the Federal Constitution and provisions of the Federal Employer's Liability Act 35 Stat. 65 (1908) as amended, 45 U. S. C. 51 et sequa. The pertinent provisions being set out as Appendix "A".

QUESTIONS PRESENTED

In an action under 45 U. S. C. 51, et sequa of the Federal Employer's Liability Act where the carrier sets up a signed release by the employee as a defense, can the employee attack the release on the ground of mistake of fact and fraud, without first tendering back the money paid under the release.

Does not the decision of the Court of Appeals of Georgia deprive petitioner of his property rights under the Fourteenth Amendment of the Federal Constitution since such a decision deprives him of his right of action (a property right) which was specifically granted to him under a Federal Statute (45 U. S. C. 51, et seq.)?

STATEMENT OF CASE

The State Court Federal Employer's Liability Act Suit. On June 22, 1963, Henry Harold Hogue was employed by respondent Southern Railway Company to perform work on its trains and was injured while working in its shops in the furtherance of interstate com-

merce. He sued Southern Railway Company under the Federal Employer's Liability Act in the Superior Court of Fulton County, Georgia (A. 1).

To this suit, Southern Railway Company filed an answer, demurrers and a plea in bar setting forth a release given to respondent and signed by petitioner (A. 7, 11, 16, 30; R. 18, 34, 108).

Petitioner amended his action (A. 10, 20, 25) and filed an answer to the pleas in bar (R. 52), setting forth that the release was obtained by reason of a mistake of fact of both parties as to the extent of petitioner's injuries and alleging that petitioner and respondent had relied on the assurances of the carrier's doctor that he had only a bruised knee and was not permanently injured, whereas later it was determined that his injury was permanent and resulted in his having two operations, one of which caused him to lose his knee cap.

Petitioner alleged that under Federal law a release given under such circumstances was not a bar to his action, but the amount paid as consideration under such release would be deducted from any recovery, made by petitioner and credited to defendant.

Respondent filed demurrers to petitioner's petition as amended (R. 108; A. 30), such demurrers were overruled and a motion for summary judgment by respondent Railroad as to its plea in bar (R. 44) was denied (R. 120), by the trial court.

Respondent appealed to the Court of Appeals of Georgia alleging that the trial court erred in overruling its demurrers and in denying its motion for summary judgment and argued that petitioner's action could not be maintained because petitioner had failed to tender back the consideration of the release, and thus petitioner's action was barred.

Thereafter, the Court of Appeals of Georgia reversed the trial court holding that in an employee's action under Federal Employer's Liability Act, a release entered into between the employer and employee could not be attacked by the employee for mutual mistake unless the employee tendered back the consideration for the release (A. 32).

Petitioner's motion for a rehearing was denied (R. 150) and petitioner applied to the Supreme Court of Georgia for a writ of certiorari (R. 152) which was denied (A. 41).

This Court granted Certiorari on January 22, 1968.

ARGUMENT

This case involved Federally Created Rights under the Federal Employer's Liability Act, and it is of great public importance that the Supreme Court construe and decide the questions raised in this petition since there is no *direct* ruling by this Court on the question. The opinion of the Court of Appeals of Georgia, in effect, states that since the question has never been decided by this Court, they will decide the question un-

der Georgia law. This question could, and probably will, arise in courts throughout the entire United States, and should be decided by the Supreme Court of the United States since rights of railroad employees are jeopardized and the cases from different state courts are in conflict.

This Court stated in *Duncan v. Thompson*, 315 U. S. 1 (2 of opinion), 86 L. Ed. 575, 62 S. Ct. 422, that a contract between a carrier and its employee, requiring the return of consideration paid under the contract before suit could be filed and maintained was a contract, the purpose and intent of which was to enable the employer to exempt itself from liability under the Federal Employer's Liability Act, and therefore was to that extent void.

In *Dice v. Akron, C & Y. R. Co.*, 342 U. S. 359, 96 L. Ed. 398, 72 S. Ct. 312, this Court held that Federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act.

Petitioner contends that the pleading, by the carrier-employer, of a release given by its employee and the employer's contention that such release could not be attacked unless the employee first tendered back the consideration of the release, is such a device as is prohibited under 45 U. S. C. Section 55.

This Court held in *Philadelphia B & W. R. Co. v.*

Shubert, 224 U. S. 601, 56 L. Ed. 911, 916 (construing Section 5 of the Federal Employer's Liability Act; 45 U. S. C. 55) that necessarily the liability must survive the acceptance of the benefits, or there could be no recovery and hence no set off.

The Court went further and said:

> "The words 'the purpose and intent of which shall be to enable any common carrier to exempt itself from any liability created by this act' do not refer simply to an actual intent of the parties to circumvent the statute. The purpose and intent of the contracts and regulations, within the meaning of the section, is to be found in their necessary operation and effect in defeating the liability which the statute was designed to enforce."

Where, as in this case, an employer pleads a release as a bar to an action by its employee for injuries, but contends further that under state law, no attack can be made on the release, since there was no tender back of the consideration of the release, and thus the employee's suit should be dismissed, the employer is using state law as a device whereby its liability to its employee is defeated.

The holding of the Court of Appeals of Georgia, that, since no tender back of the consideration of the release was made, no attack could be made on the release and the employee's suit should be dismissed, is an attempt by a state to declare what defenses can be

interposed to rights granted under the Federal Employer's Liability Act.

Such ruling is in direct conflict with the interpretation placed on 45 U. S. C. 55 by various Federal courts in different circuits and by state courts as follows:

Irish v. Central Vermont R. Co., 164 F. 2d 837 (4) 2nd Circuit:

> "A contract not to sue on claim within Federal Employers' Liability Act could by virtue of provisions in the Act be repudiated for fraud without a tender of consideration received."

Bowman v, Illinois Central Ry. Co., 132 N. E. 2nd 558 (5) (affirmed by Illinois Court of Appeals and by its Supreme Court, certiorari denied by United States Supreme Court (on another point), and holding that 45 U. S. C. Section 55 was enacted to prevent an employer who has received a release from its employee to assert return of the consideration as a condition precedent to employee's right to attack the release as a bar to the employee's action against the employer under 45 U. S. C. 51 et sequa.

Marshall v. New York Central R. Co., 218 F. 2d 900 (6) 7th Circuit, holding that where a release was obtained by fraud and misrepresentations, the employee was not required as a prerequisite to her right to maintain an action under the Act to make restitution of the amount which was received as consideration for the release.

Humphrey v. Erie R. Co., 116 F. Supp. 660 (S. D. of N. Y.) citing *Irish v. Central Vermont R. Co.*, 164 F. 2nd 837 (4) p. 667 n. 14, holding petitioner's action was not barred by reason of his failure to return the consideration of the release.

Johnson v. Elgin J. and E. Ry. Co., 87 N. E. 2d, 567 (3), holds that a tender of the consideration of a release given by an employee to his employer is not a prerequisite to the commencement of an action under the Federal Employer's Liability Act. Also see:

Guy v. Cincinnati Northern R. Co. (Mich.), 166 N. W. 667 (3) certiorari denied 246 U. S. 668, 62 L. Ed. 930.

There is no question but that, both under Federal and Georgia Law, a release may be set aside for fraud or mistake of fact, thus the primary questions here are:

1. Whether the return of the consideration for a release is a prerequisite to an employee's maintenance of his action under the Federal Employers' Liability Act?

2. If such a return of the consideration is *not* required under the Act, then did not the ruling of the Court of Appeals of Georgia deprive petitioner of his right of action (a property right) in violation of the Fourteenth Amendment of the Federal Constitution?

It is petitioner's contention that there can be no doubt that petitioner has been deprived of his property

right in his cause of action by the ruling of the state courts, and that the state action is a violation of the Fourteenth Amendment of the United States Constitution in view of the fact that the court applied state rules of law (instead of Federal law), which deprive him of the benefits given him under the Federal Employers' Liability Act.

That a state may not set at naught benefits granted by Federal statute is set out in a well reasoned opinion as follows:

In *Taxin v. Food Fair Stores, Inc.*, 197 F. Supp. 827, 830, the court held, citing from *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U. S. 173, 176, 87 L. Ed. 165:

> "It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by Erie Railroad (Co.) v. Tompkins, 304 U. S. 64 (58 S. Ct. 817, 82 L. Ed. 1188, 114 ALR 1487). There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law (citing cases)."

See also Restatement of the Law of Contracts, Section 480, page 831:

"When Offer to Return Performance Received Is a Condition of the Power to Avoid."

2. A failure to return or offer to return performance received in accordance with the rule stated in subsection (1) does not preclude avoidance if the performance . . ."

"(c) is merely money, the amount of which can be credited in partial cancellation of the injured party's claim . . ."

"the plaintiffs are not barred from asserting fraud by their failure to tender back the consideration of the release."

Petitioner contends that Congress having preempted the field of relations between carriers and their employees has provided equitable protection for an employer by allowing any consideration paid to be deducted from any judgment obtained by the employee; and provided protection to the employee by prohibiting the employer from using any device which would defeat his liability to his employees for injuries received when an action is brought under the Federal Employer's Liability Act.

CONCLUSION

Petitioner, in conclusion states that any other construction of Section 55 would be contrary to legislative intent and would open the door for the perpetuation of fraud upon the employee and the creation of injustice because of the fact that an employee has relied upon a company doctor to whom he was sent by the carrier. The representations by the company doctor and the railroad's agents would be the basic reasons for an employee being induced to settle a claim. Later, after the employee has ascertained the fact that his injuries were permanent, the carrier could assert that the employee must refund any money before he would be permitted to proceed with the claim which was not the intention of our Congress. The employees were intended to be protected where they relied in good faith upon the representations of the carrier. The carrier, under all circumstances, would receive the credit to which it would be entitled on any money that it paid to the employee.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, Samuel D. Hewlett, Jr. do certify that the foregoing Brief on Behalf of Appellant was served on the defendant by serving its attorney, John D. Jones, Esquire, Green, Buckley, DeRieux, Moore & Jones, 1240 National Bank of Georgia Building, Atlanta, Georgia, by furnishing them a copy through the United States Mail with proper postage thereon.

This ____ day of _____, 1968.

_____

Attorney for Petitioner

APPENDIX "A"

45 U. S. C. Section 51

Sec. 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the State and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the State or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employees, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way direct-

ly or closely or substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; August 11, 1939, c 685, Sec. 1, 53 Stat. 1404

* * * *

Sec. 55. Contract, rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void; *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought. April 22, 1908, c. 149, Sec. 5, 35 Stat. 66.